Supreme Court, U.S.
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No. 92-125

# In The

# Supreme Court Of The United States

OCTOBER TERM, 1992

**WALTER SENKOW,**
*Petitioner*

v.

**ROBERT B. WEISS, STEPHEN R. WERBNER, ROBERT LANNAN, GEORGE A. KANDRA and LORRAINE DUKE,**
*Respondents*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## COUNTER-STATEMENT OF QUESTION PRESENTED

May a civil rights action under 42 U.S.C. § 1983, seeking money damages and equitable relief jointly from a Town and Town officials, be pursued against the officials in their individual capacities where the Complaint expressly alleges only an official-capacity action and where the lawsuit has been determined to be barred by a valid Settlement Agreement accruing to the benefit of the Town and its officials in their official capacities.

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No. 92-125

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

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WALTER SENKOW,

Petitioner

VS.

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ROBERT LANNAN, GEORGE A. KANDRA
and LORRAINE DUKE,

Respondents

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JURISDICTIONAL STATEMENT

The respondents, Robert B. Weiss,

Stephen R. Werbner, Robert Lannan, George

A. Kandra and Lorraine Duke (hereinafter collectively referred to as "defendants") adopt Petitioner Walter Senkow's (hereinafter referred to as "plaintiff") Statement of Jurisdiction.[1]

* * * * * *

STATUTORY PROVISIONS INVOLVED

The defendants adopt the plaintiff's statement that Section 1983 of Title 42 of the United States Code is involved in this case.

The defendants also submit that this case involves Section 51 of Title 31 of the Connecticut General Statutes, specifically, Connecticut General Statutes Section 31-51q, which provides:

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[1] The Town of Manchester was the first-named defendant in plaintiff's action but has not been listed by plaintiff as a respondent in these proceedings.

> Any employer, including the state and any instrumentality or political subdivision thereof, who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or Section 3, 4 or 14 of article first of the constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. If the court determines that such action for damages was brought without substantial justification, the court may award costs and reasonable attorney's fees to the employer.

* * * * *

PRELIMINARY STATEMENT

In his Petition for Writ of Certiorari, the plaintiff essentially asks this Court to permit him to replead and change the nature of his case. He asks this Court to make new determinations and

to decide matters which were already decided by the District Court and affirmed by the Court of Appeals in accordance with well established law.

The plaintiff's presentation of the issue is misleading and unfounded in light of the pleadings and proceedings in this case. Plaintiff's complaint expressly alleged an official-capacity action only, which action is barred under the Settlement Agreement executed by plaintiff.

The defendants respectfully submit that the plaintiff fails to present a viable appellate issue to this Court and that the Petition for Writ of Certiorari should be denied.

* * * * * *

## STATEMENT OF THE CASE

The defendants hereinafter provide this Court with a brief background of this case, setting forth those facts which do

not appear in the plaintiff's Petition.

The undisputed underlying facts, as set forth in the "Ruling on Pending Motions" (Pet. App. 8-10), reveal that on December 22, 1985, photographs depicting a couple engaged in sexual intercourse were left on the desk of a female Town employee, after hours. Five days later, additional similar pictures were left on the same individual's desk, and, on yet another night thereafter, a copy of Judith Rossner's book "Looking for Mr. Goodbar" was left on the same woman's desk. The employee reported this disturbing sequence to the Town police. After investigation by the Town police, the plaintiff, in a signed sworn statement, admitted that he had committed these acts. Plaintiff declined the invitation to resign from his employment and was subsequently discharged from his employment with the Town.

The plaintiff challenged his discharge and thereafter, a settlement agreement was signed by plaintiff and his counsel whereby the plaintiff's employment termination was revoked, he was permitted instead to resign, he received $20,000 in benefits, and in return, he agreed to release and discharge any and all claims as to his employment which may have existed then or in the future. (Pet. App. 29-31). Nearly one year and a half after he executed the settlement release and procured the benefits thereunder, the plaintiff filed the instant lawsuit against the Town and the defendant Town officials.

This case involves the validity and scope of the settlement agreement into which the plaintiff entered after his discharge from employment with the Town of Manchester, Connecticut. Despite plaintiff's contentions below to the

contrary, the United States District Court for the District of Connecticut determined that the release was valid. The District Court also decided that the release barred plaintiff's claims against all of the defendants and granted summary judgment, dismissing the plaintiff's action. Nearly two months after the District Court granted summary judgment, and after the plaintiff had filed a notice of appeal, (App. 1), the plaintiff moved the District Court to reconsider its judgment and to permit the plaintiff to replead against the Town officials in their personal capacities. (App. 2-3). The District Court denied the motion and the denial was not the subject of plaintiff's appeal to the Court of Appeals.

In his Petition to this Court, the plaintiff is no longer challenging the validity of the release. Indeed, the Town

of Manchester is not listed by plaintiff as a respondent. Nor does the plaintiff argue, as he could not, that the District Court abused its discretion in denying the plaintiff's motion permit him to replead. Instead, the plaintiff argues solely that his Amended Complaint, even without the desired amendments, alleged liability against the town officials in their personal capacities. The plaintiff seeks to avoid the consequences of his settlement agreement, which was held valid and enforceable by both the District Court and the Court of Appeals, by making a plea to this Court to permit him to reopen his case and proceed against the defendants in their personal capacities under his Amended Complaint. However, as is demonstrated below, the Amended Complaint, including its caption and substantive

paragraphs, as well as the proceedings before the District Court, clearly reveal that the plaintiff expressly and explicitly sued defendant Town officials only in their official capacities.

* * * * * *

ARGUMENT

I. PLAINTIFF FAILS TO SET FORTH AN APPROPRIATE BASIS SUPPORTING HIS PETITION THAT THIS COURT SHOULD CONSIDER REVIEWING THE MATTER

United States Supreme Court Rule 10 sets forth the categories of reasons justifying consideration of a Petition for Certiorari and provides that certiorari may be granted:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings,

> or sanctioned such a departure by a lower court, as to call for an exercise of the Court's power of supervision.
> (b) When a state court of last resort had decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

As is discussed more fully in Section II below, plaintiff sued the defendants in their capacity only as agents of the Town. Plaintiff has pointed to no other decisions of the Courts of Appeals in which such a lawsuit has been determined to be anything but an official-capacity suit. Nor does plaintiff provide any facts or rationale supporting a potential contention that this case presents an important question of federal law to be addressed by this Court. Contrary to

plaintiff's assertion, the Court of Appeals for the Second Circuit did not require an explicit assertion of a personal-capacity suit in this case. Instead, the Court of Appeals based its determination on plaintiff's explicit assertion of an official-capacity agency claim, without any averment in the Amended Complaint to the contrary. (Pet. App. 5). It is conceded that plaintiff does direct this Court's attention to other decisions in which there might exist a viable basis for the consideration of the grant of certiorari. However, this case is considerably different from those cases cited by plaintiff and indeed does not contain the issue presented therein. The referenced decisions of Wells v. Brown, 891 F.2d 591 (6th Cir. 1989), Nix v. Norman, 879 F.2d 429 (8th Cir. 1989), and

Kolar v. County of Sangamon of State of Illinois, 756 F.2d 564 (7th Cir. 1985) all hold that personal-capacity suits must be specifically pleaded as such. Neither the District Court nor the Court of Appeals, directly or indirectly, so ruled in this case.

Furthermore, plaintiff does not direct this Court to any egregious departure from the accepted and usual course of judicial proceedings.

Plaintiff has failed to meet the threshold requirement of presenting to this Court any viable reason supporting his Petition for Certiorari. As this Court has stated, certiorari is granted only in those cases wherein the decision on a principle of law is of importance to the public or where there are special and important reasons for this Court's

consideration of the issue. Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-918, 94 L.Ed.2d 562, 70 S.Ct. 252 (1950); Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74-75, 99 L.Ed.2d 897, 75 S.Ct. 614 (1955). Mr. Senkow presents an issue of interest and importance to him and him alone in light of the procedural history of this case. Mr. Senkow's Petition fails to meet the standards essential for review by this Court.

* * * * *

II. NO BASIS EXISTS TO DISTURB THE DETERMINATION THAT THE PLAINTIFF SUED THE DEFENDANTS IN THEIR OFFICIAL CAPACITIES

A. EVEN UNDER LESS RIGID PLEADING REQUIREMENTS, THE PLAINTIFF DID NOT ALLEGE CLAIMS AGAINST THE DEFENDANTS IN THEIR PERSONAL CAPACITIES

This Court has recently recognized that the Courts of Appeals appear to employ different requirements in determining whether defendants have been sued in their personal capacities. See Hafer v. Melo, 502 U.S. ____, 116 L.Ed.2d 301, 308 n.*, 112 S.Ct. 358, 361 n.* (1991). Some Courts of Appeals apply a rigid pleading requirement in that the plaintiff must specifically plead that a suit for damages is being brought against an official in his or her personal capacity. On the other hand, other courts apply a "less rigid" requirement.

The defendants submit that, even under the "less rigid" requirements whereby the complaint and the proceedings below are reviewed, the plaintiff in this case did not sue the individual defendants in their personal capacities.

In his Petition, the plaintiff admits that his Amended Complaint did not explicitly assert that the defendants were being sued in their personal capacities. Under the "less rigid" cases noted by this Court in Hafer v. Melo, supra, the plaintiff must make an allegation that the defendant personally violated the plaintiff's constitutional rights. See e.g., Houston v. Reich, 932 F.2d 883, 885-86 (10th Cir. 1991) (plaintiff alleged that each defendant police officer beat and assaulted the plaintiff and deprived him of his constitutional rights). In the instant case, nowhere did the plaintiff allege that each or any of the town officials deprived him of his constitutional rights. Instead, the plaintiff very generally alleged that the defendants' (including the Town's) actions deprived the plaintiff of his

constitutional rights. (Pet. App. 24-28). Throughout the Amended Complaint, the plaintiff lumped together the Town and the Town officials in setting forth his general allegations. Furthermore, at the beginning of his Amended Complaint, the plaintiff alleged: "At all relevant times, the individual defendants operated as agents of the town." (Pet. App. 24). The Court of Appeals for the Second Circuit was correct in holding: "Neither in the caption of the Amended Complaint nor in the substantive paragraphs did Senkow allege a claim against any town employee in his individual capacity." (Pet. App. 5).

The plaintiff argues in his Petition that his claim for punitive damages within his Amended Complaint supports his contention of an individual-capacity suit. However, a review of plaintiff's

Amended Complaint reveals that plaintiff sought punitive damages from the Town under Connecticut General Statutes, Section 31-51q. (Pet. App. 28). The Third Count of the Amended Complaint separately sets forth that the Town of Manchester discriminated against the plaintiff in his employment, giving rise to punitive damages against an employer under Connecticut General Statutes Section 31-51q. (Pet. App. 27-28).

It is noteworthy that the other damages which the plaintiff sought under his Amended Complaint could have been recovered only from the Town, which is not even a respondent to plaintiff's Petition. These damages include back pay and reinstatement to employment. (Pet. App. 28).

Even under the "less rigid" approach applied by various circuit courts, the

plaintiff did not set forth personal capacity allegations against the defendants in his Amended Complaint.

Moreover, plaintiff explicitly alleged the defendants were being sued as agents of the Town. As this Court has ruled, official-capacity suits are those in which a party alleges an action against an official as an agent of the employing entity and the lawsuit is regarded as a suit against that entity. Kentucky v. Graham, 473 U.S. 159, 165-166, 87 L.Ed.2d 114, 105 S.Ct. 3099 (1985). By his express and explicit allegation, plaintiff chose to pursue an action against the individual defendants in their official capacity only, and thus a suit against the Town of Manchester, which suit was barred by the Settlement Agreement.

In addition, with respect to the proceedings before the District Court, it

is noteworthy that not until nearly two months after the dismissal of his action did the plaintiff attempt to amend his complaint to allege personal capacity claims.

### B. THERE IS NO ISSUE PENDING AS TO THE APPROPRIATENESS OF THE DISTRICT COURT'S DENIAL OF THE MOTION FOR LEAVE TO AMEND

The plaintiff notes in his Petition that the District Court "rebuffed" his attempt to amend his complaint, and that the District Court's action was unreasonable because the dismissal was with prejudice and without any right to plead over. However, the plaintiff has failed to inform this Court that his Complaint had already been once amended, and he also failed to inform this Court that he did not move the District Court to further amend his Amended Complaint until nearly two months after the District Court

granted summary judgment (App. 2-3), dismissing plaintiff's action, and after plaintiff had already appealed the District Court's grant of summary judgment. (App. 1).

Not only was the District Court's action appropriate, but the plaintiff never challenged the District Court's denial of the request for leave to amend. Consequently, plaintiff has not sought, as he cannot, this Court's review thereof. See United States Supreme Court Rule 14.1(a) ("Only the questions set forth in the Petition, or fairly included therein, will be considered by the Court").

* * * * * *

CONCLUSION

Plaintiff's attempt to frame an issue for this Court's review is based on a distorted representation of the pleadings and proceedings below. Plaintiff seeks

from this Court an opportunity to begin his case once again, six years after settling his claims with the defendants, by creating a claim explicitly excluded by him in his unsuccessful lawsuit against these defendants. Accordingly, defendants respectfully submit that plaintiff's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Hartford, Connecticut 06106
(203) 525-3101
Attorney for Respondents

No. 92-125

# In The

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OCTOBER TERM, 1992

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*Petitioner*

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MOTION FOR RECONSIDERATION
AND FOR LEAVE TO AMEND
COMPLAINT, dated
October 3, 1989 ..... A-2

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Docket No. H-88-41(AHN)

Walter Senkow

v.

Town of Manchester, et al

NOTICE OF APPEAL

1. Pursuant to Fed. R. App. P. 4(a)(1), Walter Senkow hereby gives notice and appeals to the United States Court of Appeals for the Second Circuit for the following judgment or order (describe the judgment or order): Judgment following cross-motions for summary judgment.

2. The judgment/order in this action was entered on 8/11/89.

Signature_____
Leon M. Rosenblatt
Address: 10 North Main Street
West Hartford, CT 06107

date: August 21, 1989

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | |
|---|---|
| WALTER SENKOW<br>Plaintiff | NO. H-88-41(AHN) |
| VS. | |
| TOWN OF MANCHESTER, ET AL<br>Defendants | OCTOBER 3, 1989 |

MOTION FOR RECONSIDERATION
AND FOR LEAVE TO AMEND COMPLAINT

The plaintiff moves pursuant to rules 54(b) and 60 that the court reconsider its Ruling on Pending Motions, entered on August 11, 1989. The plaintiff moves that the court 1) reconsider its Ruling to correct obvious errors of law; 2) permit the plaintiff to amend his complaint to make clear that Weiss, Werbner, Kandra, Lannan, and Duke were sued in their personal capacities; 3) enter judgment against the Town of Manchester on its counterclaim so that the FRCP 54(b)

ORAL ARGUMENT IS NOT REQUESTED

requirement of finality will be satisfied; and 4) enter judgment against Robert Weiss on Count Two.

This motion was occasioned by a Pre-Argument Conference held pursuant to the Second Circuit's Civil Appeals Management Plan (CAMP) on September 28, 1989. By agreement of the parties, the plaintiff's appeal is being withdrawn without prejudice to re-appeal after the District Court's decision on the instant motion.

A memorandum of law accompanies this motion.

THE PLAINTIFF
By_____
Leon M. Rosenblatt

CERTIFICATION

This is to certify that a copy of the foregoing was mailed, postage prepaid, on October 3, 1989, to Attorney Thomas P. Cella, 41 Center Street, Manchester, CT 06040 and Attorney John R. FitzGerald, Howard, Kohn, Sprague & FitzGerald, 237 Buckingham Street, Hartford, CT 06106.

_____
Leon M. Rosenblatt